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RIGHT OF STOPPAGE IN TRANSITU.[1]

SECOND ARTICLE.

Having noticed these two classes of cases, which belong rather to the law of sale in general, than to the branch of stoppage in transitu, let us examine the rules which govern the largest class of cases which have arisen under this branch of the law.

In the first place, what is the nature of the transitus in which the goods may be stopped?

In the case of *Stokes* vs. *La Riviere*,[2] Lord Mansfield said, that goods may be stopped "in every sort of transitus to the hands of the buyer. Ships in harbor, carriers, bills, have been stopped. In short, while the goods are in transitu, the seller has that proprietary lien" (right).

In *Mills* vs. *Ball*,[3] Lord Alvanley said, "the vendor may stop them (the goods) at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer." But to this general rule we shall find several limitations.

It makes no difference whether the goods are in motu or not, for if they are in the hands of one who holds them merely as agent to

[1] Concluded from page 591.

[2] 3 East, 397.

[3] 2 B. & P. 461.

forward, they are as much in transitu as if they were actually moving.[1] Thus if goods have been sent to a wharf to be forwarded to the vendee, as in *Smith* vs. *Goss*;[2] or if they have arrived by sea to be sent thence by land, as in *Mills* vs. *Ball*;[3] or if in the hands of the packer,[4] as at an intermediate stand, they are still in transitu. In the case of *Coates* vs. *Railton*,[5] where R. was in the habit of buying goods for Buller, and sending them to him at Lisbon, it was held that goods in R.'s hands were in transitu to Lisbon. In the case of *Northey* vs. *Field*,[6] goods deposited in the king's warehouse previous to the payment of the duties, were held to be in transitu to the vendee. In the case of *Edwards* vs. *Brewer*,[7] goods left in the wharfinger's hands, not in the vendee's name, but entered in the books in blank with freight and charges annexed, were held to be in transitu to the vendee. And even after the arrival and discharge of the vessel, but before the goods are taken possession of in the vendee's name, the vendor may stop them.[8]

It was formerly held, in the case of *Inglis* vs. *Usherwood*,[9] that goods on board a vessel chartered by the vendee, were actually

[1] Dixon *vs.* Baldwin, 5 East, 175; Dodson *vs.* Wentworth, 5 Scott N. R., 821; 4 M. & G. 1080. "The principle being," says Tindal, Ch. J., "that the delivery of the goods to the appointed agents of the vendee, from whom the agents were to receive orders as to the ultimate destination of the goods, puts an end to the right of stoppage in transitu." Wentworth *vs.* Outhwaite, 5 M. & W. 436.

Valpy *vs.* Gibson, London Jurist for 1847, p. 826. In this last case the vendors had sent the goods to the shipping agents of the vendee, but the vendee sent them back to be repacked and became insolvent while they were in the vendors' hands; held, that the vendors could not retain them against the vendee's assignees.

[2] 1 Camp. 282; Corell *vs.* Hitchcock, 23 Wend. 611.

[3] 2 B. & P. 457; Buckley *vs.* Furniss, 15 Wend. 137.

[4] Hunt *vs.* Ward, cited 3 T. R. 467. Or if in the hands of an engraver or other artificer; Owenson *vs.* Morse, 7 T. R. 64.

[5] 6 B. & C. 422.

[6] 2 Esp. 613; Nix *vs.* Olive, Abb. on Sh. 643. In Donath *vs.* Bromhead, 7 Barr, 301, the vendee paid the freight; but, in consequence of the loss of the invoice, the goods were stored in the custom house. Held, that the vendor might retake them, they being considered still in transitu.

[7] 2 M. & W. 375.

[8] Naylor *vs.* Dennie, 8 Pick. 108; Tucker *vs.* Humphrey, 4 Bing. 516; Allen *vs.* Mercier, 1 Ash. 103.

[9] 1 East, 515.

delivered. But it has been subsequently decided, that it must depend upon the power of the vendee over the vessel.[1] It makes no difference by whom the carrier is appointed;[2] while the goods are in the hands of a common carrier or freighter, to whom the vendee has to pay freight money, they may be stopped.[3] But if the delivery be into the vendee's own wagon, or on board his own ship, or on board a vessel temporarily his and under his absolute control, the right of stoppage is gone, for the driver of the wagon and the captain of the ship are his servants. The true distinction then seems to be, that if the bailee into whose hands the goods are put is the immediate servant of the vendee, the delivery is complete; but if he is a public servant, or subject to the orders of any other person, then the right of stoppage continues over the goods while in his possession.

This distinction was recognized in the case of *Boshtlingh* vs. *Inglis*,[4] where the ship being merely chartered for the voyage, the captain was the servant of the shipowner; in the case of *Fowler* vs. *McTaggart*,[5] where the vessel being wholly under the control of the vendee, the captain was his servant; and in the case of *Bolin* vs. *Huffnagle*,[6] where the vendee being owner of the ship, delivery on board was considered the same as delivery into his warehouse.[7]

[1] Cross on Lien, 301–311; Abbott on Sh. Book iv. ch. 1.

[2] Nicholls *vs.* Fenore, 2 Bing. N. C. 81.

[3] Judge Story, in the case of Marcardier *vs.* Chesapeake Ins. Co., (8 Cr. 39,) says: "A person may be owner for the voyage, who by a contract with the general owner hires the ship for the voyage, and has the exclusive possession, command, and navigation. Such is the case of Vallejo *vs.* Wheeler, (Comp. 143.) But where the general owner retains the possession, command, and navigation of the ship, and contracts to convey a cargo on freight for the voyage, the charter-party is considered a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership; such was the case of Hoe *vs.* Groveman," (1 Cr. 214.)

[4] 3 East, 381. [5] Cited 7 T. R. 442. [6] 1 Rawle, 18.

[7] The decision of Ch. J. Parsons, in Stubbs *vs.* Lund, (7 Mass. 453,) militates against previous and subsequent decisions on this point, and the ground upon which he appears to found his decision, namely: that goods may be stopped on board the vendee's own vessel, if they are to be carried to the vendee,—seems to us to be untenable. It is in direct opposition to the common law of delivery, and to the

Another limitation upon the general right of stoppage arises from the destination of the goods. If the goods are shipped not to be carried to the vendee, but to be exported to some other place, or person, the right of stoppage is gone upon delivery to the carrier. The general rule is stated to be, that if no further delivery than that to the carrier is contemplated by the parties, and no actual possession is intended by the consignee, there the transit is at an end.[1]

In the case of *Noble* vs. *Adams*,[2] the vendors having suffered the shipmaster to give the vendee an absolute and unconditional receipt without taking one to themselves, it was held "that they could not stop the goods in their subsequent transitus."

Secondly.—When is the transitus ended?

The simplest case of the termination of the transitus is where the vendee has got the goods into his actual possession. But if he is accustomed to use the warehouse of another as his own, either as a permanent place of deposit,[3] or until a new destination is given to the goods,[4] or by consent of the vendor keeps them in the vendor's warehouse,[5] or if his agent is accustomed to keep them until he receive further orders,[6] in each case the transitus is at an end when they arrive at such place of deposit. In the case of *Leeds* vs.

principle maintained in Fowler *vs.* McTaggart, 1 East, 522; Inglis *vs.* Usherwood 1 East, 515; Lawes on Charter-parties, 492; Holt on Shipping, 504.

In Bolin *vs.* Huffnagle, 1 Rawle, 18, Ch. J. Parsons' decision is much commented upon and overruled. When goods are once put into a person's hands, they are absolutely delivered; and we do not see what difference it will make whatever he may subsequently do with them. Bell's Comm. 127; Brown on Sales, 451.

[1] Stubbs *vs.* Lund, 7 Mass. 458; Rowley *vs.* Bigelow, 12 Pick. 307; Boshtlingh *vs.* Schneider, 3 Esp. 58; Fowler *vs.* McTaggart, 7 T. R. 442; 3 East, 396.

[2] Holt, 248.

[3] As in Richardson *vs.* Goss, 3 B. & P. 127; Rowe *vs.* Pickford, 8 Taunt. 83; Allen *vs.* Gripper, 2 C. & J. 218; Dodson *vs.* Wentworth, 5 Scott N. R. 821.

[4] Rowe *vs.* Pickford, 1 Moore, 526; Foster *vs.* Frampton, 6 B. & C. 107; Gerard *vs.* Nightingale, cited in Cross on Lien, 412.

[5] Barrett *vs.* Goddard, 3 Mason, 107.

[6] Dixon *vs.* Baldwin, 5 East, 175; 6 B. & C. 107; 2 Kent, 545; Dodson *vs.* Wentworth, 6 Lond. Jur. 1066.

Wright,[1] M. of London bought goods for L. G. & Co., of Paris; but had the power of sending them whenever he chose, or of selling them again in London. The court held, that delivery to M. put an end to the transitus. In the case of *Scott* vs. *Petit*,[2] Lord Alvanley said, "here there being no other place of delivery than the warehouse of the packer, the goods, when they came there, had come to their last place of delivery, and consequently were no longer liable to the right of stoppage in transitu." And if they have come into the possession, actual or constructive, of those to whom the original vendee has transferred his rights, as of his vendee or assignees, the transitus is terminated.[3] In the case of *Wright* vs. *Lawes*,[4] it was decided, that if the goods be deposited in a warehouse hired by the vendee's agent for the purpose, and the vendee comes and exercises any act of ownership over them, the transitus will be determined, though it is intended that they shall afterwards be forwarded from their first place of deposit to the vendee's abode; and in subsequent cases the marking,[5] taking samples,[6] giving delivery order,[7] have been held sufficient acts of ownership to divest the vendor's right of stoppage.

In the case of *Holst* vs. *Pownall*,[8] in 1795, Lord Kenyon decided that the vendee could not meet the goods upon their journey, and by taking possession divest the vendor's right of stoppage, and his decision was confirmed by the King's Bench. The facts of the case

[1] 3 B. & P. 320; Coates *vs.* Railton, 6 B. & C. 422; Rowley *vs.* Bigelow, 12 Pick. 307; Stubbs *vs.* Lund, 7 Mass. 453.

[2] 3 B. & P. 469. In the case of Meletopulo *vs.* Ranking, 6 Lond. Jur. 1095, A. employed B. to buy a cargo of currants, and to deliver them at Vostizza, at which place they were to be shipped for England. Held, that B. had a right of stoppage until they arrived at Vostizza, but not over their subsequent transitus.

[3] Ellis *vs.* Hunt, 3 T. R. 464; Dixon *vs.* Yates, 5 B. & Ad. 346; Scott *vs.* Petit, 3 B. & P. 469. Or into the hands of the vendee's administrator or executor. Conyers *vs.* Ennis, 2 Mason, 236; Newhall *vs.* Vargas, 13 Me. 93.

[4] 4 Esp. 82. In this case the acts of examining and tasting were considered sufficient acts of ownership.

[5] Ellis *vs.* Hunt, 3 T. R. 464.

[6] Foster *vs.* Frampton, 5 B. & C. 107.

[7] Harman *vs.* Anderson, 2 Camp. 243; Hollingsworth *vs.* Napier, 3 Caines, 182. Entering goods at the custom house was held a sufficient act of ownership, in Moltram *vs.* Heyer, 1 Denio, 483.

[8] 1 Esp. 240.

were these: The plaintiffs, in 1792, sold D. & Co. a cargo of fruit. Before the cargo reached Liverpool, D. & Co. failed, and the plaintiffs sent orders to their agent to stop it. The vessel arrived June 9th, 1793, and was ordered out to perform quarantine; but on the 9th the assignees took possession, and put two persons on board; on the 17th of June the agent of the vendors claimed the cargo. Lord Kenyon held, that the voyage was not over until the quarantine was performed, and that the consignees could not obtain possession until the completion of the voyage.

This opinion we boldly pronounce inaccurate, and upon the following authorities: Only six years afterwards, in the case of *Mills* vs. *Ball*,[1] Lord Alvanley treated the question as quite settled, "that, though the right of stoppage continues until the goods have reached their journey's end, yet if the vendee meet them upon the road and take them into his own possession, the goods will then have arrived at their journey's end, with reference to the right of stoppage in transitu." In *Whitehead* vs. *Anderson*,[2] in 1842, Parke, B., in delivering the judgment of the court, says: "If the vendee take them out of the possession of the carrier into his own, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end." The same opinion was given by Chambre, J., in the case of *Oppenheim* vs. *Russel*,[3] in 1802; and by Rogers, J., in *Bolin* vs. *Huffnagle*;[4] and in *Wright* vs. *Lawes*,[5] where goods, bought by a person residing in Norwich, were delivered into his possession at Yarmouth, on their way to Norwich; it was held that they were no longer in transitu.

A delivery of part of the goods, sold under one and the same contract, is delivery of the whole;[6] but this rule is governed by the intention of the parties. If the vendor intended to deliver the

[1] 2 B. & P. 461. [2] 9 M. & W. 518. [3] 3 B. & P. 54.

[4] 1 Rawle, 17. So in Jordon *vs.* James, 5 Ham. 88. 2 Kent, 546; Blackmore on Sale, 254.

[5] 4 Esp. 82; Chitty's Commercial Law, 350.

[6] Slubey *vs.* Heyward, 2 H. Bl. 504; Hammond *vs.* Anderson, 1 B. & P. N. R. 69. The delivery of part is held to take away the right of stoppage, unless there be circumstances to show that it was *not* intended to operate as a delivery of the whole. Betts *vs.* Gibbens, 4 N. & M. 76.

whole, then a partial delivery divests his right to stop the remainder;[1] but if the intention was that the vendee should have only a part, or if the carrier retains a part to secure his freight, the delivery is incomplete. Thus in *Bunney* vs. *Poyntz*,[2] the vendee asked permission to take away a part, so that there was a manifest intention to separate it from the residue; held, that the delivery was not complete. In *Crayshaw* vs. *Eades*,[3] where a carrier unloaded part of a cargo, but hearing of the insolvency of the consignee, re-loaded it; held, that there was no delivery. In the case of *Buckley* vs. *Furniss*,[4] the goods were forwarded in separate parcels; the vendor stopped one of them; the stoppage as to that one was held good. In *Jones* vs. *Jones*,[5] the assignee of the vendee took possession of as much of the cargo as he could dispose of, and forwarded the remainder; held, that the intention being to take possession of the whole, the delivery was complete. In *Foster* vs. *Frampton*,[6] the taking of samples was considered such an act of ownership, with respect to the whole, that the delivery was held complete; and in *Dixon* vs. *Yates*,[7] a similar act of the vendee was held not to be a taking possession of the whole.

The possession of custom house officers, or of persons holding the goods by act of law, or without any privity of contract with the vendee, does not divest the consignor's right.[8]

The vendor's right of stoppage may be divested before the termination of the transitus by the assignment of the bill of lading.

We have already seen that upon the completion of the bargain

[1] Simmons *vs.* Swift, 5 B. & C. 857. "The presumption is, that the part delivery is intended as a delivery of the whole; but it may be rebutted." Story on Contracts, § 525. Wentworth *vs.* Outhwaite, 10 M. & W. 436; Exp. Gwynne, 12 Ves. Jr. 379; Williams *vs.* Moore, 5 N. H. 235; Hanson *vs.* Meyer, 6 East, 614.

[2] 4 B. & Ad. 568; vide et etiam Hurry *vs.* Mangles, 1 Camp. 452; Miles *vs.* Gorton, 2 C. & M. 500; Jones *vs.* Jones, 1 M. & W. 431.

[3] 1 B. & C. 181. [4] 17 Wend. 514.

[5] 8 M. & W. 431; vide et etiam Macomber *vs.* Parker, 13 Pick. 175.

[6] 6 B. & C. 107; Hinde *vs.* Whitehouse, 7 East, 558.

[7] 5 B. & Ad. 313; Bloxam *vs.* Sanders, 4 B. & C. 947.

[8] Per J. Sprague, in Burnham *vs.* Windsor, 5 Law Reporter, 507; Northey *vs.* Field, 2 Esp. 613; Donath *vs.* Bromhead, 7 Barr, 301.

the vendee acquires the general right of property,[1] subject to the vendor's right of stoppage in case of insolvency. This right of property the vendee may transfer without any documentary evidence of possession on his part, or of delivery to his vendee, but he can transfer no greater right than he himself has.[2] In order to make a complete transfer of the property, the vendee must have a bill of lading endorsed to him,[3] or he must be the person therein named to receive the goods.[4] This bill he must endorse[5] to his subvendee for a valuable consideration,[6] and in furtherance of a bonâ fide contract to confer an interest in the goods.[7] And, lastly, the transferree must take[8] the bill without knowledge of such circumstances as render the bill not fairly and honestly assignable.[9]

It is not necessary that the bill should be endorsed in furtherance of a contract to transfer the whole interest in the goods. *Lickbarrow* vs. *Mason*,[10] is itself a case of pledge, and the vendor's right

[1] Emptio et venditio contrahitur simul atque de pretio convenerit quamvis nondum pretium numeratum sit. Domat, 1, 2, 3: 2.

[2] Traditio nihil amplius transferre debet vel potest, ad eam, qui accepit, quam est apud eam, qui tradit. Ulpianus.

[3] Nathan *vs.* Giles, 5 Taunt. 558; Nix *vs.* Olive, Abb. on Sh. 643. (Unless, of course, the bill is endorsed in blank.)

[4] Tucker *vs.* Humphrey, 4 Bing. 516; Stanton *vs.* Eager, 16 Pick. 467; Abb. on Sh. 633.

[5] Kinlock *vs.* Craig, 3 T. R. 219.

[6] Waring *vs.* Coxe, 1 Camp. 369; Coxe *vs.* Harden, 4 East, 211.

[7] Patten *vs.* Thompson, 5 M. & S. 350. An assignment as collateral security, and subsequent endorsement of the bill of lading, held to divest the consignor's right in Lempriere *vs.* Pasley, 2 T. & R. 485; Walter *vs.* Ross, 2 Wash. C. C. R. 283.

[8] On the necessity of the delivery of the bill, vide Buffington *vs.* Curtis, 15 Mass. 528.

[9] Lickbarrow *vs.* Mason, 2 T. R. 63; Wright *vs.* Campbell, 4 Burr. 2051; Evans *vs.* Martlett, 1 Ld. Raym., 271; Illsley *vs.* Stubbs, 9 Mass. 65; Stubbs *vs.* Lund, 7 Mass. 453; Walter *vs.* Ross, 2 Wash. C. C. 283; Salomans *vs.* Nissen, 2 T. R. 681; Hibbert *vs.* Carter, 1 T. R. 745; Caldwell *vs.* Ball, 1 T. R. 205; Dick *vs.* Lumsden, Peake's Cases, 189. According to Emerigon, the unpaid vendor was not affected by the transfer of a bill of lading. But by the Code of Commerce, art. 578, goods cannot be stopped which have been bonâ fide sold, according to the invoices and bills of lading, or bills of transportation.

[10] 2 T. R. 63.

was divested. In Re Westzynthers,[1] the King's Bench decided, that an endorsement of the bill of lading, by way of pledge, terminated the vendor's right of stoppage, and was equivalent to an actual delivery to the vendee; but that the unpaid vendor was entitled by stopping the goods, to the surplus of the proceeds of the goods after the pledgee's advances were paid off.

Knowledge on the part of the transferree, that the transfer divests the vendor's right,[2] or that the goods have not been paid for,[3] does not render such transfer invalid. But knowledge, at the time of the assignment, that the assignor was insolvent[4] would make the transaction dishonest.

The transfer of a bill of lading which has been fraudulently obtained, does not divest the consignor's right.[5]

In the case of *Wilmshurst* vs. *Bowker*,[6] in 1844, the carrier signed a bill of lading to deliver to the order of the vendor, who endorsed the bill to the vendee and sent it to him. The goods were shipped "for the account and at the risk of the vendee." It was

[1] 5 B. & Ad. 817. But a factor cannot pledge his principal's goods so as to divest the right of stoppage. Martin *vs.* Coles, 1 M. & S. 140; Newson *vs.* Thornton, 6 East, 23; Paterson *vs.* Fish, Strange 1778. And it makes no difference that the pledgee was ignorant of the fact that the pledgor was not owner. 1 M. & S. 140; Salomans *vs.* Nissen, 2 T. R. 674; 5 Ves. Jr. 213.

[2] Cuming *vs.* Brown, 9 East, 506.

[3] Salomans *vs.* Nissen, 2 T. R. 681; 1 Camp. 104; Haille *vs.* Smith, 1 B. & P. 564; Walley *vs.* Montgomery, 3 East, 585; Coxe *vs.* Harden, 4 East, 211; 2 Kent, 550.

[4] Vertue *vs.* Jewell, 4 Camp. 31; Haille *vs.* Smith, 1 B. & P. 564; Kinloch *vs.* Craig, 3 T. R. 119; 2 Kent, 550.

[5] Osey *vs.* Gardner, Holt 405. Nor fraudulent transfer of goods to a person who pays freight and charges. Lempriere *vs.* Pasley, 2 T. R. 485.

[6] 7 Man. & Gr. 882. It seems never to have been doubted but that the consignee might transfer his interest in the goods to a third person by an assignment in proper form of the bill of lading. Vide Evans *vs.* Martlett, 1 Ld. Raym. 271; Wright *vs.* Campbell, 4 Burr. 2046, 1 Blk. 628; Caldwell *vs.* Ball, 1 T. R. 205. The doubt which arose in Lickbarrow's case was, whether this assignment by the consignee divested the consignor's right of stoppage; vide Whitaker, 209 et seq. In the absence of contradictory evidence, the statement in the bill of lading that the goods were shipped by the agent of the vendee, is conclusive evidence of delivery to the purchaser. Meletopulo *vs.* Ranking, 6 Lond. Jur. 1095.

held that the vendor could not stop the goods after the vendee had received the bill of lading.

The law is not yet established as regards the divesting the vendor's right of stoppage by other documents. There have been several nisi prius decisions, but they conflict, and we feel unwilling to give an opinion without having an opportunity of stating the grounds upon which it is founded.

The right of stoppage can only be exercised upon the actual or reasonably expected insolvency of the vendee.

This is a limitation which flows from the equitable origin of the law on this subject. It was clearly and forcibly expressed by Lord Stowell, in the case of the Constantia.[1] He says, "it is not an unlimited power which is vested in the consignor to vary the consignment at his pleasure. It is a privilege allowed to the seller to protect him against the insolvency of the consignee. Certainly it is not necessary that the person should be insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of what has been done. But if the person is not insolvent, the ground is not laid on which alone such a privilege is founded. The mercantile law is clear and distinct, that the seller has not a right to vary the consignment, except in the case above stated.

The French law[2] on this point is identical with the English, and the same principle was maintained in the case of St. Jose Indiano,[3] by Story, J. In the case of *Naylor* vs. *Dennie*,[4] Parker, Ch. J.

[1] 6 Rob. Adm. R. 327, Chapman *vs.* Lathrop, 6 Cow. 110. Becoming insolvent, means becoming unable to pay one's debts, and does not signify going into bankruptcy. Biddlecombe *vs.* Bond, 4 A. & E. 332; vide Coward *vs.* Atlantic Insurance Co. 1 Peters, 386.

[2] 1 Emerigon, 317 & 318.

[3] 1 Wheat. 208, vide et etiam Wood *vs.* Roach, 2 Dall. 180; Buckley *vs.* Furniss, 15 Wend. 137. In Walley *vs.* Montgomery, 5 East, 584, it was held that the consignee having accepted bills, the consignor could not stop the goods and demand immediate payment, the consignee not having failed Stanton *vs.* Eager, 16 Pick. 475.

[4] 8 Mass. 205.

says: "We do not find that the right of stoppage depends upon the declared insolvency or open bankruptcy of the vendee before the arrival of the goods. It is enough that his affairs are so involved that he is unable to pay for the goods, if he was to pay for them upon delivery, or that he shall have become actually insolvent before he shall have taken possession." But if the vendor knew at the time of the sale that the vendee was insolvent, he will not be entitled to stop the goods.[1]

With regard to the manner of exercising the right of stoppage in transitu:

It is now decided that the mere bankruptcy of the vendee does not of itself operate as a countermand of his previous order.[2] In *Scott* vs. *Petit*,[3] a doubt was raised on this point, but it was afterwards dispelled by the court.

In the case of *Wiseman* vs. *Vanderput*,[4] being the earliest case extant upon this subject, the court held that the vendor was entitled to get his goods back by "any means;" and Lord Hardwicke held, in *Snee* vs. *Prescott*,[5] that he might lawfully get possession of his property by any means short of absolute violence. The same doctrine has been maintained in subsequent cases.[6]

It was formerly held by Lord Hardwicke, in the case of *Northey* vs. *Field*,[7] that the vendor must actually repossess himself of his goods; but this rule has been relaxed, and in *Mills* vs. *Ball*,[8] the court considered a *claim* or *demand* of the goods as equivalent to taking actual possession of them, for the purpose of exercising the right of stoppage in transitu. In *Oppenheim* vs. *Russell*,[9] and in *Boshtlingh* vs. *Inglis*,[10] it was decided that if the goods were *demanded* by any one authorized by the consignors to receive them

[1] Buckley *vs.* Furniss, 17 Wend. 504.

[2] Ellis *vs.* Hunt, 3 T. R. 467.

[3] 3 B. & P. 469. Boshtlingh *vs.* Schneider, 3 Esp. 58.

[4] 2 Vern. 203.

[5] 1 Atk. 245.

[6] Salomans *vs.* Nissen, 2 T. R. 674; Barnes *vs.* Freeland, 6 T. R. 80; Smith *vs.* Staples, 1 Esp. 578; Ferze *vs.* Wray, 3 East, 93.

[7] 3 Esp. 613.

[8] 2 B. & P. 457.

[9] 3 B & P. 47.

[10] 3 East, 394.

from the person in whose hands they were, that such demand was tantamount to actual stoppage.[1]

But the demand must be actual and express, and not merely constructive or implied, and there should be at least a demand and an attempt to get possession on the part of the vendor, and to prevent them from coming into the hands of the vendee.[2] We cannot find any decision maintaining that a mere countermand is a sufficient exercise of the right of stoppage. "If the notice is given to the principal whose servant has the custody of the goods, as it was in *Litt* vs. *Cowley*[3] at such a time and in such circumstances, that the principal may, by the use of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee it is effective."[4]

The stoppage may be effected either by the vendor himself or by his agent, and this agent may be either a special or general agent, provided the act be afterwards ratified by his principal.[5]

But an effectual stoppage cannot be made in behalf of the vendor by a third party not at the time his agent, even although the act be afterwards confirmed by the vendor;[6] and an act of stoppage to be effectual must in all cases be done *eo intuitu.*

Although in *Mills* vs. *Ball*,[7] (1801) it was doubted, in the subse-

[1] Here we cannot help noticing the strong inclination shown by the courts to favor the right of stoppage: For while a claim or demand is a sufficient assertion of his right on the part of the consignor to constitute a valid stoppage of the goods, possession is necessary on the part of the consignee to divest the consignor's right. Thus in Northey *vs.* Field, 2 Esp. 613, a prior claim made by the consignee was held ineffectual, while a subsequent claim made by the consignor was held sufficient. So also in Snee *vs.* Prescott, 1 Atk. 245; Newhall *vs.* Vargas, 13 Maine, 93. Nor will the payment of freight on the part of the vendee divest the vendor's right. Mills *vs.* Ball, 2 B. & P. 457.

[2] In Walker *vs.* Woodbridge, Co. B. L. 494, the vendor entered the goods "to arrive" at the custom house, and this was held sufficient assertion of his right to constitute a valid stoppage. In Bell *vs.* Moss, 5 Wharton, 189, the consignor's agent notified the consignees that the goods were not paid for, and that the consignors claimed their right to stop them. This was held sufficient, although no notice was given to or demand made of the carrier.

[3] 7 Taunt. 169. [4] Whitehead *vs.* Anderson, 9 M. & W. 518.

[5] Holst *vs.* Pownall, 1 Esp. 240; Bell *vs.* Moss, 5 Wharton, 189; Lickbarrow *vs.* Mason, 2 T. R. 63; Mills *vs.* Ball, 2 B. & P. 457, vide Paley on Prin. & Agt. 124.

[6] Siffkin *vs.* Wray, 6 East, 371. [7] 2 B. & P. 457.

quent case of *Oppenheim* vs. *Russell*,[1] (1802) it was decided, that if the carrier should deliver, after a notice from the vendor of his claim, that he would be liable in an action of trover brought by the vendor, who might also recover back the goods from the vendee.

Upon the arrival of the goods, the vendee may in some cases decline to receive them.

The right of contracting parties to rescind an existing contract till executed, or the rights of third parties have intervened, is universally admitted, when not in fraud or contravention of the bankrupt laws.[2] For "until an act of bankruptcy the *jus disponendi* over goods remains with the trader, unless he exercise it by way of a voluntary and fraudulent preference of a particular creditor, in contemplation of bankruptcy."[3]

Thus in the case of *James* vs. *Griffin*,[4] where the goods were landed, but the vendee declared his determination "not to meddle with them, and said that the vendor ought to have them, and that he would not have them;" it was held that the goods had never come into the possession of the vendee, and that the vendor was entitled to them.[5]

Not only must this rescision be without fraud to the other creditors,[6] but must be assented to by the vendor;[7] his positive assent is not necessary, as it will be presumed, or it may be inferred from circumstances.[8] But if an act of bankruptcy intervenes between

[1] 3 B. & P. 42; Litt *vs.* Cowley, 7 Taunt. 169; Patten *vs.* Thompson, 5 M. & S. 350; Holst *vs.* Pownall, 1 Esp. 240.

[2] Vide Long on Sales, chap. vi.; 2 Kent, 551; Lawes on Charter Parties, chap. iv.

[3] Dixon *vs.* Baldwin, 5 East, 186. It is a question for the jury to decide, whether the return was made *bona fide*, or from any motive of voluntary or undue preference, vide et etiam Harman *vs.* Fisher, 1 Cowp. 117; Naylor *vs.* Dennie, 13 Pick. 198.

[4] 2 M. &. W. 622.

[5] So in Scholfield *vs.* Ball, 14 Mass. 39; Atkin. *vs.* Barwick, 1 Str. 165. And the precedent debt is sufficient consideration, Ferze *vs.* Wray, 3 East, 93; Naylor *vs.* Dennie, 8 Pick. 205; Bartram *vs.* Farebrother, 4 Bing. 479.

[6] Barnes *vs.* Freeland, 6 T. R. 80.

[7] Salte *vs.* Field, 5 T. R. 211; Smith *vs.* Field, 5 T. R. 402; Lane *vs.* Jackson, 5 Mass. 157; Widgery *vs.* Haskell, 5 Mass. 144; Mills *vs.* Ball, 2 B. & P. 457; Long on Sales, 240.

[8] Richardson *vs.* Goss, 3 B. & P. 125; Lawes on Charter Parties, 557.

the offer to rescind and the assent, the assent comes too late to prevent the operation of bankruptcy.[1]

In the case of *Fidgem* vs. *Sharp*,[2] it was decided that the vendee, being in embarrassed circumstances, but not believing himself insolvent and not contemplating bankruptcy, might refuse to receive the goods. But if the vendee has once received the goods he cannot restore them, because that would be giving the vendor an undue preference.[3]

What is the situation of the parties, after the right of stoppage is exercised?

Even after the goods have been stopped by the vendor, the vendee may claim them within a reasonable period upon offering payment.[4]

The vendor may still sue for breach of contract, and for the price of the goods sold, being ready to re-deliver.[5]

We think ourselves authorized, although there are some opinions to the contrary, in stating that the vendor may re-sell the goods after a reasonable notice given to the vendee and his declining to pay for them. In the case of *Newhall* vs. *Vargas*,[6] it is said "the right of the vendor to re-sell after notice of such intention and reasonable time allowed to the vendee to pay for and take away the goods, seems now to be admitted."

In the case of *Longfort* vs. *Tyler*,[7] Holt, Ch. J. is reported to have ruled—"if the vendee does not come and pay and take the goods, the vendor ought to go and request him, and then if he does not come and pay and take away the goods in convenient time, the

[1] Richardson *vs.* Goss, 3 B. & P. 125; Lawes on Charter Parties, 557.

[2] 5 Taunt. 539. The same formalities are required in rescinding as in making a sale. Quincy *vs.* Felton, 5 Green, 277.

[3] Mate *vs.* Ball, 2 East, 117; Barnes *vs.* Freeland, 6 T. R. 80,; Long on Sales, 256; 2 Kent, 551.

[4] Bloxam *vs.* Sanders, 4 B. & C. 941; Brown on Sales, § 3648; 2 Kent, 541; Long on Sales, 338; 1 Atk. 245; C. B. L. 394; 3 T. R. 466; 3 Esp. 59; 3 Esp. 585.

[5] Kymer *vs.* Survercropp, 1 Camp. 109; 2 Kent, 541; Long on Sales, 338; 6 Taunt. 162.

[6] 15 Maine, 314, vide et etiam Long on Sales, 338.

[7] 1 Salk. 113; Abb. on Sh. 619. This dictum was approved by Ellenborough, Ch. J., in Hinde *vs.* Whitehouse, 7 T. R. 571.

agreement is dissolved and he is at liberty to sell them to any other person." The same doctrine seems to be maintained by the cases of *Bloxam* vs. *Sanders*,[1] *Bloxam* vs. *Nash*,[2] *McLean* vs. *Dunn*.[3] In this latter case, Best, Ch. J. says: "It is admitted that perishable articles may be re-sold. But if articles are not perishable, prices may alter in a few days or a few hours. It is most convenient that when a party refuses to take the goods he has purchased, they should be re-sold, and that he should be liable to the loss, if any, upon the re-sale."[4]

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INJURIES BY ANIMALS.[5]

It is now a firmly established doctrine of our law, that the liability of the owner of an animal, for injury which it has committed on another man's person or animals, depends on such owner's knowledge of its having a propensity to cause such mischief. Thus, where a declaration stated that the defendant kept a fierce mongrel mastiff, which he improperly allowed to be loose, and which had bitten the plaintiff, Holt, C. J., and Turton, J., held that the declaration was bad for not averring that the plaintiff had notice of its mischievous qualities; Gould, J., thinking, however, that the averment of ferocity was enough, as the plaintiff had not kept the dog safe. (*Mason* vs. *Keeling*, Ld. Raym. 606; 12 Mod. 332.) And, again, it was held, that if a dog chases sheep, &c., without setting on, or notice before to the master, an action did not lie. (Lutw. 119; Dy. 25 b, 29 a; 1 Vin. Ab. 234; *Card* vs. *Case*, 5 C. B. 622; *Thomas* vs. *Morgan*, 2 C., M. & R. 496.) And where

[1] 4 B. & C. 941. [2] 9 B. & C. 145.

[3] 4 Bing. 722; 1 M. & P. 761.

[4] So also decided in Newhall *vs.* Vargas, 15 Maine, 314. In Sands *vs.* Taylor, 5 Jo. R. 410, Kent, Ch. J. says: "It would be unreasonable to oblige him (vendor) to let the article perish on his hands, and run the risk of the solvency of the buyer."

[5] From the "London Jurist."